QUESTIONS PRESENTED

1. Whether an employer violates § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), by repudiating its contractual obligation to arbitrate grievances otherwise within a contract's arbitration provision, and involving disputes over the proper interpretation and application of that agreement, on the sole basis that disputes first arose and involve facts occurring after the agreement's general expiration date?

2. Whether an employer violates § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 8(a)(5), by unilaterally abandoning grievance arbitration as a term or condition of employment upon the expiration of a collective bargaining agreement without presenting a proposal to the union and bargaining to an impasse on the question? *

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* The union respondent in this Court is Printing Specialties District Council Number 2, the successor to District Council Number 1.

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STATEMENT OF THE CASE

A. Facts:

Litton Financial Printing Division ("Litton" or "the employer") operated a check printing plant in Santa Clara County, California. The union represented the production and maintenance employees. In 1974, the union and the employer entered into a collective bargaining agreement which, after a series of amendments and extensions, was in effect until October 3, 1979. J.A. 71.[1]

A decertification election was conducted by the NLRB on August 17, 1979. The union won the election and ultimately a certification was issued in favor of the union on July 2, 1980. J.A. 106-107. After Litton decided to test the certification and refused to bargain with the union, the Board, in a proceeding related to this one, found Litton's failure to bargain to be an unfair labor practice. *Litton Financial Printing*, 256 NLRB 516 (1981). Consequently, Litton was illegally refusing generally to recognize the union during the period when the layoffs and grievances involved in this case occurred (although the employer did offer to bargain solely over the *effects* of the layoff decision here at issue).[2]

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[1] That contract is referred to in this brief as the 1978 Agreement, since the last extension occurred in 1978. J.A. 71.

[2] In addition, Litton's refusal to bargain over the *decision* to lay off the ten individuals was found to be an unfair labor practice by the Board in this case, and the Board's decision in that regard was enforced by the court below. Since this Court denied Litton's petition for writ of certiorari on that issue, the legality of Litton's refusal to bargain over the layoff decision is not before the Court. In short, Litton's assertion that there is "no . . . Board . . . finding that petitioner refused to meet with the union at a reasonable time and confer in good faith" (Brief for Petitioner ("Pet. Br.") at 12-13), is untrue.

This dispute was triggered when ten out of forty-two employees were laid off within a four day period in late August and early September, 1980. Of the top ten employees on the seniority list (J.A. 66-67), seven employees were laid off. The union immediately filed separate grievances on behalf of each laid-off employee.

Each of the layoff grievances (G.C. Ex. 4; *see also* J.A. 63-64) asserted a violation of the "layoff" provision of the 1978 Agreement which stated:

> It is also understood that in case of layoffs, length of continuous service will be the determining factor if other things such as aptitude and ability are equal. J.A. 30.

Section 21 of the 1978 Agreement subjected to resolution through the grievance procedure any "[d]ifference[s] that may arise between the parties hereto regarding this Agreement and any alleged violations of this Agreement, and the construction to be placed in any clause or clauses of the Agreement . . ." J.A. 34.

At the time of the layoffs, Litton continued to maintain a seniority list (J.A. 66-67 and 93), and paid the employees vacation pay and severance pay in direct relation to the length of their service, (J.A. 68-69). Throughout this litigation, Litton has contended that the layoffs did comply with the standards for layoff contained in the expired collective bargaining agreement, while the union has maintained otherwise. J.A. 96. Despite this difference concerning the meaning of the 1978 Agreement as applied to a post-1979 layoff, Litton refused to submit the layoff grievances to the grievance procedure at all, and therefore refused to arbitrate the validity of the layoffs. The basis for Litton's refusal was the broad assertion that because the 1978 Agreement had expired, the grievance arbitration provision was entirely void.

B. Proceedings Below:

The NLRB General Counsel issued a complaint against Litton on November 24, 1980, alleging, *inter alia*, that

Litton had engaged in an unfair labor practice within the meaning of NLRA §§ 8(a) (1) and (5), 29 U.S.C. §§ 158(a) (1) and (5), by refusing "to process the grievances." J.A. 15. The Administrative Law Judge ("ALJ"), on September 4, 1981, found, applying principles enunciated in the NLRB's decision in *American Sink Top Co.*, 242 NLRB 408 (1979), that Litton had indeed violated §§ 8(a) (1) and (5) by refusing to process the grievances, including by declining to arbitrate those grievances. J.A. 114-118.

Litton filed exceptions to the ALJ's recommended decision on this issue. Six years later, the Board reversed the ALJ's decision in part and affirmed in part.

Applying standards the NLRB had set out in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), the Board held, *first*, that Litton "violated Section 8(a) (5) and (1) of the Act by refusing to process the layoff grievances [at all] pursuant to the grievance-arbitration clause in the expired collective-bargaining agreement" (Pet. App. B5); *second*, that Litton also violated §§ 8(a) (5) and (1) by repudiating *any* contractual obligation to arbitrate after the contract's termination date (Pet. App. B 1); but *third*, that Litton had no obligation to arbitrate the layoff grievances themselves, because "the right invoked by the grievances does not 'arise under' the expired contract under *Nolde* [*Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).]" Pet. App. B 16.

In explaining this latter conclusion, the Board looked not at the grievances themselves, or at the union's contentions regarding the applicability of the expired contract in pressing those grievances but, instead, directly at the layoff provisions:

> The right to layoff by seniority if other factors such as ability and experience are equal is not a "right worked for or accumulated over time." *Indiana & Michigan Electric, supra*, . . . And as in *Indiana &*

> *Michigan Electric*, there is no indication here that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." *Id.* [Pet. App. B16.]

The union filed a petition for review of the arbitration aspect of the Board's opinion. In support of its petition the union argued, first, that the entire approach of the Board to post-contract arbitration as spelled out in *Indiana & Michigan* is in error, because, contrary to the Board's holding in that case, arbitration provisions, like other terms and conditions of employment, should remain in effect as a matter of statute unless and until the employer bargains to impasse as to changing or abandoning arbitration. In addition, the union took the position that on the Board's more narrow, contractual approach, the Board's conclusion could not be squared with this Court's opinion in *Nolde, supra.*

The Court of Appeals granted the union's petition on the second, narrower ground, and remanded the case to the Board, expressly noting that "[in this appeal, the union has launched a broad-based attack on the fundamentals of the Board's *Indiana & Michigan* decision[,] . . . contend[ing] that an employer who unilaterally abandons a pre-existing arbitration procedure during the post-expiration or hiatus period is guilty of a refusal to bargain under *NLRB v. Katz*, 369 U.S. 736 (1962)." The Ninth Circuit, however, declined to reach this broad contention. Instead, the Court of Appeals concluded that even on the Board's own, contract-based approach, the Board erred.

Specifically, the Ninth Circuit rejected the Board's "accruing or vesting" standards as "[not] consistent with . . . *Nolde*." Instead, the Court of Appeals held that a presumption of arbitrability under an otherwise terminated agreement arises with regard to disputes that develop concerning events after the agreement has expired as long as " 'the dispute is *over a provision of the expired agreement*' " and " 'hinges on the interpretation

ultimately given the contract clause.' " Pet. App. A21, (emphasis in original), *quoting Nolde*, 430 U.S. at 255, 249. In addition, the Court of Appeals regarded the Board's decisions on the question whether its "accruing or vesting" standard covers seniority disputes as inconsistent. Pet. App. A19-20, 22.

This Court granted Litton's Petition For Writ of Certiorari on November 13, 1990, limited to the arbitrability question decided below.

SUMMARY OF ARGUMENT

The NLRB erred in determining that the layoff grievances were not arbitrable under the 1978 Agreement for two independent reasons.

I. First, the Board's standard for determining the arbitrability of posttermination grievances—whether the rights relied upon "accrue" or "vest" during the term of the agreement—is *flatly inconsistent* with the principles governing arbitrability under labor contracts generally, and with the arbitrability standard governing posttermination grievances particularly articulated in *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977). Ordinarily, grievances that claim the violation of some provision of a collective bargaining agreement are arbitrable, without more; as this Court has explained, as long as that requirement is met, the parties are entitled to the arbitration they have bargained for, even if a claim lacks merit, or appears frivolous. Moreover, because of the national labor policy favoring arbitration as a method for resolving industrial disputes, arbitration clauses should be construed to cover particular grievances if at all possible.

Nolde simply applied these principles to grievances that arise after an agreement has expired and concern facts also arising after contract termination. Relying on several earlier decisions of this Court recognizing that the parties to a collective agreement may intend some aspects

of the contract to retain force after its general expiration date, *Nolde* recognized a presumption governing contract interpretation, which the parties can negate "expressly or by clear implication", that an arbitration clause in an expired agreement applies after the agreement's termination as long as the dispute is "over a provision of the expired agreement." 430 U.S. at 255.

As the NLRB has conceded, its limiting gloss on *Nolde*, denying arbitrability to some grievances such as the one in this case that do raise contractual issues concerning the applicability of the expired contract to posttermination events, conflicts with the "arising under" language used in *Nolde*. Moreover, that acknowledged conflict is more than mere semantics: The Board's more limited approach makes the arbitrability of posttermination contractual disputes depend upon the merits of the parties' contentions about whether or not the particular provision relied upon survives the contract's termination date, as this case illustrates. And the net effect of the Board's approach is not to solve the contractual issues the moving party seeks to raise, but to move the dispute either to the courts or to a contest of economic power. Because this result squarely conflicts with the principles for interpreting labor contracts in light of the national labor policy favoring the peaceful determination of contract-based disputes, and because the courts—not the Board—have the principal responsibility for declaring the rules governing the construction of labor contracts, the Board's "accrued" or "vested" limitation on *Nolde* should be disapproved.

Finally, while the foregoing should be dispositive on the *Nolde* question, the Court of Appeals was also correct in remanding to the Board because of inconsistencies in the Board's own cases applying *Nolde*.

II. Alternatively, the NLRB should be reversed because, contrary to current Board doctrine, arbitration systems properly come within the general doctrine that

employers may not unilaterally alter terms and conditions of employment before, during or after the effective dates of a collective bargaining agreement, absent a contractual waiver of the right to bargain or a bargaining impasse.

The unilateral change doctrine, first fully explained in *NLRB v. Katz*, 369 U.S. 736 (1962), seeks to preserve the integrity and vitality of the collective bargaining process by requiring employers to maintain established terms and conditions of employment until the obligation to bargain is fully satisfied. Heretofore, only three kinds of mandatory subjects of bargaining have been excluded from the employer's status quo obligation, each because of strong and direct evidence in the NLRA that the term must expire with the underlying agreement.

None of the reasons the Board gives for creating an additional exception to the *Katz* doctrine for arbitration systems (but not for the grievance mechanism leading up to arbitration) has merit. While arbitration clauses are, under the NLRA's legislative history and this Court's cases, are, of course, contract-based, arbitration is no *more* contract-based than any other term or condition of employment, including wages, hours, and benefits. As to *all* terms and conditions of employment, the NLRA eschews imposing requirements on the parties in the first instance, but only leads them to the bargaining table to decide all such waivers for themselves. The *Katz* doctrine is not in any tension with this principle; rather, under that doctrine, the parties determine their own employment conditions in the first instance, but, precisely to preserve the integrity of the bargaining process, cannot *change* those conditions outside the bargaining process.

Moreover, the Act does not provide employers with the unlimited right to bargain, and to engage in economic warfare, concerning the continuation of mandatory terms and conditions of employment into the post contract period. Therefore, requiring the employer to arbitrate about

such matters does not compromise any statutory right, nor unfairly disadvantage the employer.

ARGUMENT

Throughout this case, the union has relied upon two separate, alternative legal theories, each deriving from long-established lines of authority under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5):

We argued first that the employer impermissibly repudiated the arbitration clause of the 1978 collective bargaining agreement. Since the seniority grievance the union filed alleged a violation of that agreement, we maintained that the arbitration clause of the agreement applies under *Nolde Bros. Inc. Inc. v. Local 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) (even though, upon arbitration, the arbitrator could decide *on the merits* that the grievants had no right to seniority-based lay-offs because the seniority provisions had expired).

As to this contract repudiation approach, the NLRB agreed that a § 8(a)(5) remedy would be appropriate if, indeed, the union did have a contract-based right to arbitrate the grievance in question. Pet. App. B7-B8, B15-B16; *see also Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987); Brief for the National Labor Relations Board as Respondent Supporting Petitioner ("NLRB Br."), at 4 n.4, 17-18. The Board determined, however, based on its reading of *Nolde's* teachings on the application of labor arbitration provisions after the general termination date of a collective bargaining agreement, that there was in fact no contract repudiation.

It was on this point that the Court of Appeals reversed the Board, holding that there is no basis under this Court's cases for a refusal to *arbitrate* the contention that a particular labor contract provision has continuing impact after the general expiration date of the contract. As the Court of Appeals recognized, since the dispute is incontestably one about the meaning and effect of that contract, the arbitration provision should apply; the question whether the seniority clause in fact continues to provide employees with any rights after the contract's expiration date is a separate issue, concerning the merits of the dispute, not its arbitrability. Because the Board's approach to the application of *Nolde* conflates the arbitrability issue and the merits of the issue sought to be arbitrated, that approach is squarely contrary to this Court's cases, and should be disapproved.

Second, we maintained that even if the union had no *contractual* right to insist upon arbitration of the seniority grievance, the employer nonetheless violated § 8(a)(5) by unilaterally abandoning the arbitration system as a term of employment. This theory, drawing upon the long-established principle that employers may not unilaterally change terms and conditions of employment once a collective bargaining representative has been chosen without first fulfilling the statutory duty to bargain with that representative concerning the proposed change, was also rejected by the NLRB on the basis of its earlier opinion in *Indiana & Michigan Electric Co., supra*. Although the union continued to press that theory in the Court of Appeals, that court had no occasion to address its validity, because of its acceptance of the contract-based approach just outlined. Pet. App. A17-A18.

We address these two contentions in turn, stressing that each is independently sufficient, if the Court accepts the union's position, to support affirmance of the judgment below.

I. THE PRESUMPTION OF ARBITRABILITY EXTENDS TO ANY DISPUTE CONCERNING THE INTERPRETATION OR APPLICATION OF A COLLECTIVE BARGAINING AGREEMENT CONTAINING AN ARBITRATION CLAUSE, REGARDLESS WHEN THE DISPUTE OR THE FACTS UNDERLYING IT ARISE.

We have no quarrel with the basic parameters of the Board's contract repudiation theory as outlined in its brief to this Court. NLRB Br. at 17-18. Under that § 8(a)(5) doctrine, to the extent that there is a contract-based obligation to arbitrate grievances after the termination date of a collective bargaining agreement, an employer violates its duty to bargain in good faith by categorically renouncing that obligation. *Id.*[3] This aspect

[3] As the Court of Appeals expressly noted, in that court the employer as well accepted the Board's basic § 8(a)(5) contract repudiation doctrine as explicated with regard to the post-termination date arbitration obligation in *Indiana & Michigan*, and debated only the application of that doctrine to the particular facts and contract language in this case. Pet. Ap. A16 n.8. Specifically, Litton questioned the Board's result under the contract repudiation prong of *Indiana & Michigan* only on the basis of its arguments that (1) there was sufficiently clear evidence in the contract that the parties' intended the arbitration provision to lapse entirely on the expiration date of the contract; and (2) the relatively long passage of time between the contract termination date and the filing of the layoff grievances should itself negate any finding that the expired contract contemplated arbitration of those grievances. *Id.*

In this Court, however, the employer appears fundamentally to question the Board's rule that an employer who flatly refuses in a wholesale manner to accept as binding, and to implement, the agreement reached by the parties violates the obligation to bargain in good faith, no matter when that repudiation occurs, and also seeks the square overruling of this Court's opinion in *Nolde*. Pet. Br. 12-14, 15-17. Because Litton's broad-ranging contentions, fundamentally calling into question both long-established Board doctrine and a decision of this Court never questioned in any of this Court's cases, were not raised in the Court of Appeals (or, for that matter in the Petition for a Writ of Certiorari), this Court should not entertain those contentions. *Youakim v. Miller*, 425 U.S. 231, 233-34 (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Town*

of the case turns, then, upon a determination as to the proper construction of a contractual obligation to arbitrate as applied to grievances claiming that some aspect of that agreement applies to acts occurring after the general termination date of the contract.

In this case, for example, the grievances concerned layoffs that were implemented months after the agreement's stated termination date. Those grievances were, however, based on the provisions of the agreement establishing seniority as an important criteria in making layoff decisions. J.A. 30. This contractual claim could be sound, or it could be unsound. *See* pp. 22-24 & n.14, *infra*. Either way, however, the *dispute* is one that is covered by the arbitration clause of the 1978 agreement as a "[d]ifference . . . between the parties regarding this Agreement and any alleged violations of this Agreement, and the construction to be placed on any clause or clauses of the Agreement . . ." (J.A. 34), and should therefore be arbitrable.

A. *General Principles Governing Arbitrability*: As a general matter, this Court's approach to determining the arbitrability of labor disputes has turned upon two basic propositions established in the *Steelworkers' Trilogy* cases in 1960. *First*, because "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement," and "[t]he processing of even frivolous claims may have therapeutic values of which those who are rot part of plant environment may be quite unaware," arbitration pursuant to a collective bargaining agreement should be

of Hallie v. City of Eau Claire, 471 U.S. 34, 42 n.5 (1985). In the discussion that follows, however, we do respond briefly to some of the arguments Litton makes regarding the basic parameters of the contract repudiation prong of *Indiana & Michigan*, particularly those intended to cast doubt upon the vitality of *Nolde*. *See* pp. 17-19, *infra*.

required without regard to the merits of the grieving parties' contract-based claim:

> The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. . . . The question is not whether in the mind of the court there is equity in the claim. . . [Rather] [t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. [*United Steelworkers v. American Manufacturing Co.*, 363 U.S. 563, 567, 568 (1960).]

See also United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960) ("the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."); *AT & T Technologies v. Communications Workers of America*, 475 U.S. 643, 649-50 (1986) ("Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.")

Second, again because of the unique role played by the arbitration of disputes in the labor relations system, in construing the reach of a collective bargaining agreement's arbitration clause, there is a strong presumption in favor of the arbitrability of disputes between the contracting parties:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [*Warrior & Gulf*, 363 U.S. at 582-83.] [4]

This presumption has particular force where the arbitration clause, like the one in this case, covers all disputes, without exception, concerning the interpretation or application of the collective bargaining agreement:

> In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." [*AT & T Technologies*, 475 U.S. at 650, *quoting Warrior & Gulf*, 363 U.S. at 584-85.]

B. *Arbitrability of Post-Contract Disputes*: An unbroken line of this Court's cases applying these principles to disputes that in some respect concern events occurring after the general termination date of a collective bargaining agreement confirm that where the *dispute* is over the provisions of a particular collective bargaining agreement, and is one otherwise within the terms of the contractual arbitration provision, there is the usual strong (albeit rebuttable) presumption that the arbi-

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[4] As the Court explained in *Warrior & Gulf*, *supra*:

> The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. [363 U.S. at 580-81.]

tration provisions in that agreement *do* apply to that dispute, regardless of the merits of the union's contractual claim. This presumption pertains no matter when the dispute arises, when the events underlying the dispute occurred, or whether rights are claimed with respect to a period of time after the agreement's general termination date.

The first case in this Court in which a question arose concerning an arbitrator's authority to determine questions reaching beyond the stated general termination clause of a labor agreement was *United Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960), one of the *Steelworkers' Trilogy*. *Enterprise Wheel* concerns the question whether an arbitrator has jurisdiction to award back pay covering a time period after the stated termination date of the collective bargaining agreement under which arbitration was invoked. The Court held that, as long as there is nothing to show "that the arbitrator did not premise his award on his construction of the contract" (*id.* at 598), the arbitrator has authority to construe the effect of the agreement during a post-termination time period.[5]

Four years later, this Court was faced with a situation in which a union "framed the [arbitration] issues to claim rights . . . after the agreement expired by its terms." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 554 (1964). The Court judged that arbitrability claim

[5] *Enterprise Wheel* involved the question of the enforceability of an arbitrator's award after it is issued rather than whether the employer has an obligation to arbitrate a particular dispute in the first place. For present purposes, however, the distinction is immaterial. As *Enterprise Wheel* itself makes clear, the principle that courts must defer to the decisions of labor arbitrators as long as the arbitrator's award "draws its essence from the collective bargaining agreement" (*id.*, 363 U.S. at 597) is based on the same premise as the rule that in deciding arbitrability in the first place, the merits of the dispute are immaterial: In either case, "the question of interpretation of the collective bargaining agreement is a question for the arbitrator," (*id.* at 599).

by the standards applicable to all other contractual disputes:

> We see no reason why parties could not, if they so chose, agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired.
>
> * * * *
>
> Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts . . . *See* [*Warrior & Gulf*,] 363 U.S. at 582-83. [*Wiley*, 376 U.S. at 555.]

Wiley thus confirmed the two fundamental premises which are critical for this case: first, that parties to a collective bargaining contract *may* agree that rights established during the term of agreement are to be realized after the contract expires; and second, that the question whether the parties have in fact so agreed with respect to any particular situation is *a merits issue for the arbitrator*, not an issue governing the arbitrability of the dispute in the first instance.

Most recently in *Nolde*, a case involving the arbitrability under an expired agreement of a union's claim that severance pay was due and owing after the contract had expired, this court reaffirmed the lessons of its earlier cases.[6] *Nolde* noted first that the arguments of the parties in that case demonstrated that "both the Union's claim for severance pay and Nolde's refusal to pay the same are based on their differing perceptions of a provision of the expired collective-bargaining agreement,"

[6] The *Nolde* Court (430 U.S. at 252) noted that in *Piano Workers v. Kimball Co.*, 379 U.S. 357 (1964), the Court in a brief *per curiam* applied *Wiley* to a situation in which, unlike *Wiley*, the union first sought to arbitrate a grievance concerning the post-expiration effect of a collective bargaining agreement after the agreement expired, thereby implicitly deciding the precise issue presented to the Court in *Nolde*. It is worth noting for present purposes that on the merits, the dispute in *Piano Workers v. Kimball Co.* involved a seniority dispute. *See* 333 F.2d 761 (7th Cir. 1964).

with regard to whether a substantive claim for severance pay could survive the collective bargaining agreement. 430 U.S. at 249. Because "whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay," *Nolde* characterized the dispute as one which "although arising *after* the expiration of the collective bargaining contract, clearly arises *under* that contract." *Id.* And, in determining whether this dispute concerning contract interpretation should be referred to arbitration, the Court deliberately refused to entangle itself in the merits of the parties' contractual claims, stressing that "[o]f course, in determining the arbitrability of the dispute, the merits of the underlying claim for severance pay are not before us." *Id.*

Instead, the *Nolde* Court—recognizing that the "severance-pay dispute . . . would have been subject to resolution under those procedures [the grievance-arbitration machine] had it arisen during the contract's term," (*id.* at 252)—held that the arbitrability of post-termination contract disputes, like the arbitrability of pretermination disputes, turns strictly on the proper construction of the *arbitration* clause of the contract alone. And, in construing that clause, *Nolde* held the presumption of arbitrability does not "necessarily expire with the collective bargaining agreement that brought it into existence." *Id.* at 250.[7] Instead, the ordinary presumption of arbitrability applies, even "where the dispute is over a provision of the expired agreement," unless that presumption is "negated expressly or by clear implication." *Id.* at 255.[8]

In light of the arguments raised by petitioner, by its *amicus curiae*, and by the Board in this case for limiting or abandoning *Nolde* (*see* n.3, *supra*; NLRB Br. at 22-23), two related aspects of this Court's opinion there bear particular emphasis. First, *Nolde* is a case about how arbitration clauses in collective bargaining agreements are to be *interpreted* as a matter of the federal common law of collective bargaining agreements. The opinion states an interpretive *presumption* as to the parties' actual intent regarding post-contract arbitration, basing that presumption upon both the national labor policy favoring arbitration of industrial disputes and upon the Court's perception of what parties to a collective bargaining agreement arbitration clause most likely contemplate, absent a clear indication to the contrary.[9] Noth-

[7] *Nolde* explained that the reason for continuing the presumption of arbitrability concerning contract interpretation questions into the post-termination period is that "[b]y their contract the parties clearly expressed their preference for an arbitral rather than a judicial interpretation of their obligations under the collective-bargaining agreement" and "the termination of the collective-bargaining agreement . . . would have little impact upon many of the considerations behind their decision to resolve their contractual differences through arbitration." *Id.* at 254. In particular, the Court noted such considerations as "confidence in the arbitration process," "an arbitrator's presumed special confidence in matters concerning bargaining agreements" and the parties' "interest in obtaining a prompt and inexpensive resultation of their disputes by any expert tribunal"—"do[] not terminate with the contract." *Id.* at 254.

[8] There are, in fact, contracts which do expressly provide that grievances arising after the contract has expired are not arbitrable. *See, e.g., S & W Motor Lines, Inc.*, 236 NLRB 938, 949-950 (1978); *McKesson Drug Co.*, 291 NLRB No. 117 (1988); *General Warehousemen and Employees Union Local No. 636 v. J.C. Penney Co.*, 484 F. Supp. 130, 132 n.1 (W.D. Wisc. 1980). The language relied upon in these cases to determine that post contract disputes are not arbitrable was the kind of "express exclusion or other forceful evidence," *AT&T Technologies*, 475 U.S. at 652, which renders disputes nonarbitrable.

[9] *Nolde* is consistent with a broad range of cases in this Court applying the presumption favoring arbitrability under collective bargaining agreements despite a contention that in the particular circumstances, the presumpton should not apply. *See, e.g., Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) (presumption of arbitrability applies to safety dispute, despite union's contention to the contrary); *Operating Engineers v. Flair Builders, Inc.*, 406

ing in *Nolde* makes any grievance arbitrable as a matter of law, or seeks to override the parties' clearly expressed intent to the contrary.[10]

Second, for that very reason, it is *not* true that it would "shock[] most unions" (Pet. Br. at 16) to recog-

U.S. 487 (1972) (laches cannot serve as a bar to arbitrability, because "the company is obliged to submit its laches defense even if 'extrinsic,' to the arbitrable process" (*id.* at 492)); *John Wiley & Sons*, 376 U.S. at 556-559 (questions concerning "procedural" arbitrability are arbitrable); *Drake Bakery v. Local 50 Confectionery Workers*, 370 U.S. 254 (1962) (an employer must arbitrate its damage claim against the union despite the contention that the union's conduct repudiated the grievance and arbitration procedure); and *Carey v. Westinghouse*, 375 U.S. 261 (1964) (jurisdictional grievance arbitrable even though only one union party to the jurisdictional dispute would participate in and be bound by the arbitration award).

Moreover, courts have held that questions concerning whether a collective bargaining agreement remains in effect or has been terminated are arbitrable, providing that the arbitration clause is broad enough. See, *e.g. Rochdale Village, Inc. v. Public Service Employees Union Local No. 80*, 605 F.2d 1290 (2d Cir. 1979); *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 v. Interstate Distributor Company*, 832 F.2d 509 (9th Cir. 1987). The NLRB agrees that questions of contract termination are ordinarily to be resolved through the grievance procedure. *See Refrigeration Design Contractors*, 278 NLRB 122 (1986). Since questions such as the one in this case really concern whether a particular provision of a contract has entirely terminated or remains in effect for certain purposes, no reason appears why that dispute as well should not be determined by the arbitrator.

[10] Indeed, like the employer in *Nolde* (430 U.S. at 251), Litton accepts the proposition that the arbitration clause of an expired collective bargaining agreement governs where the facts giving rise to the grievance took place before contract expiration (Pet. Br. at 20, 24), and, going further, concedes as well the obligation to arbitrate post-contract "entitlements generally regarded as compensation for services already rendered." (Pet. Br. 23). Thus, in the end Litton's disagreement is only with the reach of the post-contract presumption of arbitration recognized by the Court in *Nolde*, and not with the propriety of creating such a presumption as an aid to contract enforcement at all.

nize an obligation to refrain from striking over post-contract grievances arbitrable under *Nolde Bros.* Any responsibility to refrain from economic pressure over such grievances would itself be a contractual one, not one imposed by law, as the NLRB has expressly recognized in perceiving such a limited post-contract no-strike obligation. *Goya Foods*, 238 NLRB 1465, 1466 (1978).[11]

C. *The Board's "Accrued" or "Vested" Rights Rule*: Despite the Board's acknowledgement that "*Nolde* con-

[11] The Board's opinion in *Goya Foods* appears to be a sensible application of this Court's relevant cases. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) held that where a union *agrees* to submit particular disputes to final and binding arbitration, that commitment is violated if the union strikes concerning that dispute, either instead of arbitrating or in addition to doing so. *Id.* at 106. *Gateway Coal Co. v. United Mine Workers, supra*, in turn, applied the same principle to a safety dispute, holding first that the presumption of arbitrability applies fully to safety disputes (as it does, under *Nolde*, to disputes concerning the post-contract survival of contractual terms); and second that the resulting determination that the union made a *commitment* to arbitrate gives rise, under *Lucas Flour*, to a concommitant contractual commitment not to strike over the arbitrable grievance: "Absent an explicit expression [to the contrary], the agreement to arbitrate and the duty not to strike should be *construed* as having coterminous application." *Gateway Coal*, 414 U.S. at 382 (emphasis supplied); *see also Metropolitan Edison Co. v. NLRB*, 490 U.S. 693, 708 n.12 (1983). As the Board concluded in *Goya Foods*, where "[t]he agreement 'lives' on in the duty to arbitrate . . . so should the duty not to strike live on *to the extent of the duty to arbitrate over issues . . . arising out of the expired agreement.*" 238 NLRB at 1467 (emphasis supplied).

In any event, as the Board notes in its brief, in this case there was, *in addition to the general no-strike clause* contained in the expired collective bargaining agreement, an *express* contractual commitment by the union not to strike over *any* "grievance as to the interpretation or application of the terms of this Agreement." J.A. 34-35; *see* NLRB Br. at 24-25 n.22. Given that express promise, there is no need in this case to read into the agreement to arbitrate a no-strike clause that runs coterminously with that commitment. Therefore, this case can be decided without reaching the validity of *Goya Foods*.

tains language with a broader sweep than its narrow holding that a claim to severance pay arguably accruable under the contract is arbitrable . . . after the contract expired" (*Indiana & Michigan*, 284 NLRB at 60), the NLRB nonetheless applied to this case its *Indiana & Michigan* rule limiting the presumption of arbitrability of posttermination events to "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.* at 60. The Board's narrow approach to the arbitrability of postcontract disputes has no basis whatever in *Nolde's* language *or* reasoning, and is squarely contrary to the most basic premises of this Court's arbitration cases.

a. The Board's "accrued or vested right" limitation is on its face entirely inconsistent with the governing standard this Court enunciated in *Nolde*—namely, whether the dispute "arises under" the contract (430 U.S. at 249, 253) or "out of the collective bargaining relationship" (*id.* at 255). This Court has consistently used those terms and similar ones to avoid any predetermination of the outcome of the dispute in question, and to assure that the arbitrability inquiry is focussed instead on whether an issue of contractual interpretation or application is involved.

For example, *United Steelworkers v. American Manufacturing Company*, 363 U.S. at 567, explained that "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that *arise under* the agreement," (emphasis supplied). At the same time, this Court stressed that in deciding upon arbitrability, the appropriate inquiry is "whether the party seeking arbitration is making a claim which *on its face is governed by the contract.*" *Id.* at 568 (emphasis supplied.) *American Manufacturing* thus used the term "arising under the agreement" to refer to *any* dispute where the party was "making a claim which on its face is governed by the contract." *Id. See also Warrior & Gulf*, 363 *U.S.* at 576 (using the word "arise" broadly in the context of describing an arbitration clause); *John Wiley & Sons*, 376 U.S. at 553-54 (describing a grievance procedure that defined a grievance as a dispute "between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement . . ." as reaching the disputes in that case because those disputes had "arisen between the Union and Interscience. . ." as a result of a change in ownership).

Nolde, in turn specifically *rejected* the proposition that the use of the phrase "arises under" is a term of limitation or exclusion:

> However, even though the parties could have so provided, there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract, but which is based in events that occur after its termination.
>
> . . . .
>
> Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that *they intended to arbitrate all grievances arising out of the contractual relationship.* [430 U.S. at 252-253 and 255 (emphasis supplied).] [12]

b. The Board's "accrued" or "vested" rights approach is inconsistent with *Nolde* not simply linguistically, but in more fundamental respects as well. For in *Nolde*, the Court emphatically repeated its oft-stated caution *against* turning the arbitrability question into one on "the merits of the underlying claim for severance pay" (430 U.S. at 249; *see also* pp. 15-17, *supra*), and instead made

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[12] *Nolde* referred to "accrued" or "vested" rights only in describing the union's argument on the *merits* of the contractual dispute underlying its grievance in that case. 430 U.S. at 248.

clear that the presumption of arbitrability depends upon whether or not "*whatever the outcome*, the resolution of that claim hinges on the interpretation ultimately given the contract clause," (*id.* at 249).

Under the Board's approach, on the other hand, the Board necessarily "encroaches on the merits of the dispute, an area reserved for the arbitrator." *Indiana & Michigan*, 284 NLRB at 63 (Member Johansen, dissenting). Indeed, the *Indiana & Michigan* Board explicitly acknowledged as much. *Id.* at 60.[13]

The Board's application of its "accruing" or "vesting" limitation in the context of this case vividly illustrates how that standard operates to usurp the function of the arbitrator and to pretermit the arbitration process as a means of determining the merits of the contractual dispute. In the instant case, the Board opined that "there is no indication here that 'the parties contemplated that such rights could ripen or remain enforceable even after the contract expired.'" Pet. App. B 16. In its brief (at 24-27) the Board amplifies that statement, arguing at

[13] In support of the proposition that it is permissible, in "determining arbitrability" to use an "analysis extended beyond [the] arbitration clause to [the] interpretation of the contract right" advanced by the grieving party, the Board relied upon *AT&T Technologies, supra*. *Indiana & Michigan*, 284 NLRB at 60. Nothing in *AT&T Technologies*, supports the proposition that in construing a general arbitration clause, like the one in this case, applying to all contractual interpretation questions, the substance of the particular contractual right relied upon is relevant. To the contrary, *AT&T Technologies* restated in the strongest possible terms, and relied squarely upon, the proposition that in determining arbitrability "a court is *not* to rule on the potential merits of the underlying claims," and instead is to order a contractual claim arbitrated "[w]hether 'arguable' or not, indeed even if it appears to the court to be frivolous." 475 U.S. at 649-50. (emphasis supplied). The fault that the *AT&T Technologies* Court found with the Court of Appeals decision there was that the lower court did not determine arbitrability under the arbtiration clause *at all*, leaving that decision entirely to the arbitrator. *See generally id.* at 652-656 (Brennan, J., concurring).

length that because the layoff clause in this case recognized seniority as relevant only "if other things such as aptitude and ability are equal" (J.A. 30), that clause necessarily entailed a comparison of those "other" factors as of the date of the layoff, and therefore could not have been intended to govern after the contract's expiration date. On this basis, the Board distinguished two other cases, *Uppco, Inc.*, 288 NLRB 937 (1988) and *United Chrome Products*, 288 NLRB 1176 (1988), in which the Board had found that seniority rights *can* sometimes "arise under" the terms of the expired agreement within the limited, meaning the Board attributes to "arise under."

But the finecut contract interpretation question the Board thereby determined—whether or not the right to "layoff by seniority if other factors such as ability and experience are equal" survived the bargaining agreement, as some seniority provisions do or, rather, evaporated entirely once the contract expired because of the nature of the seniority privilege conferred by this particular layoff clause—is, of course, the very question that the union was asking the *arbitrator* to decide.[14]

[14] While, as we stress in the text, the merits of this dispute are not relevant to the arbitrability question, it is worth noting that the union had reasonable arguments to make before the arbitrator, soundly grounded in national labor policy, to support the proposition that the seniority layoff clause should have been read to cover the 1980 layoffs.

This Court has recognized that "[s]eniority has become of overriding importance, and one of its major functions is to determine who gets and keeps an available job." *Humphrey v. Moore*, 375 U.S. 335, 347 (1964). Because employees may, to protect their seniority, forego other opportunities in order to remain in a job, it is generally perceived as fundamentally unfair to divest an employee of accumulated seniority. For that reason, federal labor legislation generally protects seniority rights, even in the face of competing, important rights of other employees. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 (1977) (Title VII's protection of seniority, 42 U.S.C. § 2000e-2(h)); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275,

That this substantive posttermination continuity question is not answered in terms in the agreement is immaterial in determining its arbitrability under this Court's

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284 (1946) (veterans returning to their jobs after military service must be granted seniority equivalent to that which they would have had had they remained continuously employed); *Drapery Manufacturing Co., Inc.*, 170 NLRB 1706 (1968) (employer ordered, upon reopening a closed plant, to establish "a preferential hiring list of all employees in the appropriate unit, following the system of seniority, if any, customarily applied to the conduct of Respondent's business."); *Litton Microwave Cooking Products Division, Litton Systems, Inc.*, 283 NLRB 973, 977 (1987); *Laidlaw Corporation*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (reinstated economic strikers entitled to their prestrike seniority even if the contract in effect when they went on strike has terminated); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 (1963) ("accumulated seniority of older employees" cannot be divested by granting superseniority to strike replacements).

As these cases reflect, seniority provisions create a form of earned advantage, accumulated over time, that can be understood as a special form of deferred compensation for time already worked. Thus, contractual seniority provisions may sometimes create expectations that continue to be enforceable in the post-contract period. *See Uppco, Inc., supra.* At the same time,

> There are great variations in the use of seniority principles through collective bargaining bearing on . . . the consequences which flow from seniority. All of these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. [*Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 526 (1949).]

The layoff language which the union claims the employer violated is a form of modified seniority, because the right of retention is based upon aptitude and ability as well as length of continuous service. F. Elkouri & E. Elkouri, *How Arbitration Works, Fourth Edition* (1985) at 611-13. While the Board insists that the addition of other factors to seniority negates any possibility of continuity into the post-contract period (NLRB Br. at 27), for two reasons the Board is incorrect.

First, many of the "additional factors" are themselves related to an employee's continuity of service in the precontract period, so

cases. One of the strengths of arbitration in the industrial context is that it is a process for filling in "gaps" in the agreement "by reference to the practices of the particular industry and of the various shops covered by the agreement," thereby serving as "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Warrior & Gulf*, 363 U.S. at 580-81. *See also Allis-Chalmers v. Lueck*, 471 U.S. 202, 215 (1985) (courts may not proceed upon "[t]he assumption that the labor contract creates no implied rights").

Nor is it material to the arbitrability question that, on the merits, the union's position, in the Board's view, is

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that any contractually-established rights concerning those factors would also carry forward. For example, "ability" could include such factors as training and length of experience on the job. *See Elkouri & Elkouri*, at 623-625.

Second, the arbitrator would be able to consider, as the Board did not, whether actual practices in the plant gave content to the bare words of the agreement. It could be, for example, that the employer ordinarily relied upon seniority in determining layoffs except when the differences in "other factors" are much greater than even the employer claims to be the case here. In other words, upon adjudication it might have turned out, with respect to some or all of the grievants, that the only *real* difference between the parties concerned whether the employer was entitled to abandon the role seniority usually played in making layoff decisions solely because of the contract's expiration.

In deciding that question, in turn, the arbitrator could consider that Litton *did* maintain the role of seniority in determining terms and conditions of employment after the contract's expiration. *See Nolde*, 430 U.S. at 249, n.5. For example, Litton prepared a new seniority list on August 26, 1980 (J.A. 66-67); paid vacation and severance pay in accordance with seniority as of September 4, 1980; and claimed to be following the contract in the manner in which it laid employees off (J.A. 96). Finally, the contract contained a provision for "baseball" interest arbitration which the arbitrator could conclude had the effect of continuing the contract until the new contract was resolved. (J.A. 53-54.)

incorrect. That is true even if one assumes that the Board has sufficient relevant information, without a full evidentiary hearing on the contract interpretation question, to make this decision. This Court has made it plain time and again that where the parties have contracted for an *arbitrator's* judgment, they are entitled to that judgment, and may derive long term benefit to the collective bargaining relationship *regardless of the outcome of the arbitration process. See, e.g., United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568; *Carey v. Westinghouse*, 375 U.S. at 272; *see also* pp. 11-12, *supra*.[15]

It is very much to the point in this regard that refusing to order arbitration of a dispute between the parties concerning the impact of a provision of an expired agreement upon posttermination events does not resolve the dispute, but simply moves adjudicative resolution of the dispute to the other available forum, the federal courts. In this case, for example, if the arbitration clause was indeed unavailable, then the affected employees, or the union on their behalf, could have filed a lawsuit in federal court under *Smith v. Evening News Association*, 371 U.S. 195 (1962), concerning their contention that they were laid off in violation of the 1978 agreement. Yet,

[15] Moreover, where, as here, the collective bargaining relationship continued (pursuant to the Board's ruling in a related case, *see* p. 1, *supra*) after the contract itself expired, the parties have an ongoing interest in obtaining the arbitrator's views regarding the meaning and effect of the expired agreement. In negotiating a new agreement, the parties will have to decide whether to seek changes in the previous contract terms; those decisions could well be influenced by an arbitrator's determination, based upon posttermination facts, concerning the effect of those terms in actual situations. Further, to the extent that the same contract language is carried forward into the next agreement in whole or in part, the determination of an arbitrator regarding the effect of that language during contract hiatus periods will itself become part of the "common law of the shop" (*Warrior & Gulf*, 363 U.S. at 582) that arbitration is intended to create.

> By their contract the parties clearly expressed their preference for an arbitral rather than a judicial, interpretation of their obligations under the collective-bargaining agreement. . . . [T]he alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid. [*Nolde*, 430 U.S. at 254.]

Finally, if there were no applicable arbitration clause, there would be no applicable contract-based no-strike clause (*see* n.11, *supra*; *see also* pp. 44-47, *infra*), and the union would have the choice of initiating a judicial proceeding to resolve the dispute or, instead, striking over the dispute (or, conceivably, both). *Cf. Groves v. Ring Screw Works*, —— U.S. ——, 59 U.S.L.W. 4043 (1990). Thus, removing the presumption of arbitrability with respect to a group of contract-based disputes would lead to the possibility of economic warfare over such disputes, "a method [not] of resolving the dispute over the application or meaning of the contract [but] . . . [of] one party impos[ing] its will upon its adversary." *Id.* at 4045. It is because "such a method is the antithesis of the peaceful methods of dispute resolution envisaged by Congress when it passed the Taft-Hartley Act" (*id.*) that this Court has labored to erect the "strong presumption favoring arbitrability," (*Nolde*, 430 U.S. at 254).

In short, as this Court already determined in *Nolde*, as long as the dispute is one which is "based on [the parties] differing perceptions of a provision of the expired collective bargaining agreement" (430 U.S. at 249), the considerations underlying this Court's arbitrability presumptions obtain, (*id.* at 254).[16] Unless those pre-

[16] With respect to Litton's contention that the length of time that elapsed in this case between the expiration of the contract and the layoffs forecloses arbitration, we have only the following to add to the Board's dispositive response (NLRB Br. at 24 n.22) rejecting this argument: The employer has presented no evidence to show how it is prejudiced by any length of time elapsing between the expiration of the contract and the date of the grievance. If there were such an argument to be made, it could be pressed before the arbitrator. *Operating Engineers v. Flair Builders, supra*, 406 U.S.

sumptions are "negated expressly or by clear implication" (*id.* at 255), the Board may not itself negate the presumption depending upon its view of the merits of the contractual dispute.[17]

c. This conclusion is unaffected by considerations concerning the deference often paid by the courts to Board decisions interpreting the National Labor Relations Act. *E.g., NLRB v. Curtin Matheson Scientific, Inc.*, —— U.S. ——, 110 S. Ct. 1542 (1990).

The contract repudiation aspect of this case, as the discussion above indicates, does not turn in any respect at all upon the NLRB's view of those portions of the federal labor statutes ordinarily committed to the Board for resolution in the first instance. Rather, the Board's rationale is based *solely* upon its interpretation of the federal common law governing the interpretation of collective bargaining agreements developed under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Section 301, in turn, "authorizes *federal courts* to fashion a body of federal law for the enforcement of these collective bargaining agreements. . ." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957) (emphasis supplied); *see also Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962) ("Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law . . .'").

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at 490-91 (issues of laches must be raised by an employer as a defense before the arbitrator.)

[17] We note, in addition, that, aside from its conceptual difficulties and the fact that it cannot be squared with *Nolde*, the Board's approach has little to recommend it in terms of creating a workable rule by which the parties can govern themselves. The principle that an arbitration clause ordinarily applies to any grievance invoking a provision of a collective bargaining agreement is one simple to understand and to follow; the distinction between such provisions which do involve "accrued" or "vested" rights and those which do not is likely to require an outside adjudicatory body to determine, as the Board's proffered distinction between this case and other seniority issues it has determined indicates. *See* pp. 30-31, *supra*.

The NLRB, it is true, is entitled to "construe[] a labor agreement to decide [an] unfair labor practice case. . ." *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967), and the Board therefore had jurisdiction to do so in this case. But "[a]rbitrators and courts are still the principal sources of contract interpretation." *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969). Because the Board, in determining the contract repudiation aspect of this case, "did not in anyway rely on matters within its special competence. . ." (*Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960)), a court is "fully justified in making its own independent determination of the correct application of the governing principles," (*id.*). *See also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529, n.9 (1984) (refusing to defer to the Board's interpretation of a statute which is "outside its expertise"); *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1030-31 (D.C. Cir. 1986) (courts should not defer to the Board's views on contract interpretation questions because, *inter alia*, to avoid the risk of conflicting principles regarding the interpretation of contracts, court-developed interpretations should prevail.)[18]

D. *Application of the Board's Standard*: While we believe that the foregoing is dispositive on the contract repudiation issue, the Court of Appeals reversed the NLRB here *both* because the Board applied an erroneous arbitrability standard *and* "[b]ecause of the conflicts within the Board's own cases in applying its test for determining when a post-expiration grievance 'arises under'

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[18] Contrary to the Board's suggestion (NLRB Br. at 17), the Board's refusal to order Litton to arbitrate the grievance dispute was not an exercise of the Board's remedial discretion. NLRB Br. at 17. Rather, as here pertinent, that refusal was based solely on the Board's view on a purely contractual question. There is no reason why the principles discussed in the text negating deference to the Board's views on contract issues should vary depending upon the context in which those issues arise. *See* Pet. App. A 19 (rejection by Court of Appeals of the Board's remedial deference argument).

the CBA so as to give rise to a duty to arbitrate." Pet. App. A 22. In that respect as well, the Court of Appeals was correct, for two reasons.

First, the Board's test for determining whether a matter is arbitrable, as expressed in *Indiana & Michigan*, is whether the grievance "concerns contract rights *capable* of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." 284 NLRB at 60. *See also id.* (whether the grievance is "arguably accruable under the contract. . ."); *United Chrome Products, Inc., supra* (whether the grievance creates *"at least a question* whether the expired contract has conferred on the employees rights that would survive the contract's expiration"). This standard still turns arbitrability on the grievance's merits in a way inconsistent with *Nolde* and its predecessors. Nonetheless, had the standard been properly applied in this case, the Board would have had to determine that the union did raise "at least a question" of continuity of the layoff clause, and that the layoff grievances are arbitrable.[19] Put another way, given the arguments available to the union, a decision favoring the union on the layoff grievance would be one in which the arbitrator is at least "even arguably construing or applying the contract. . ." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Instead of deciding whether the union made a sufficient showing to "raise a question" on the accrual question, however, the Board answered the question itself. *See* Pet. App. B16.

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[19] The Board uses the words "accruing or vesting." While "vesting" suggests some degree of permanence, "accrue" in the ordinary dictionary definition means "To be added as a matter of periodic gain or advantage, as interest on money." *Random House Dictionary of the English Language*, p. 10. Thus, there is no necessary concept of any permanence to something which "accrues." In a collective bargaining sense, then, it is at least arguable that *any* seniority, whether modified or strict, "accrues" over the time during which the employee works.

Second, the Board in two cases decided after this one held that seniority grievances *can* meet the Board's restrictive standard of arbitrability. In *Uppco, Inc., supra*, the Board stated:

> The contractual definition of seniority makes it plain that, under the parties' agreement, seniority is a benefit that accrued over time during the life of the contract. The contract also specifies the ways by which seniority is lost. Significantly, the contract did not specify that seniority is lost on contract expiration. The contract's failure to specify expiration as one of the ways in which seniority rights could be lost indicates that the parties intended that seniority rights remain enforceable after contract termination. Therefore, the grievance over the Respondent's refusal to recall employees by plant-wide seniority following the strike involves a right worked for and accumulated during the term of the contract and intended by the parties to survive contract expiration. [288 NLRB at 940; *see also United Chrome Products, supra.*]

While *United Chrome*, and the Board's Brief to this Court (at 25-28), attempt to distinguish this case on the basis of differences between the seniority clauses and post-contract practices, nothing in the Board's opinion in this case suggests that either the precise nature of the layoff seniority clause or the employer's post-contract practices (which in fact were *consistent* with postcontract application of seniority (*see* n.14, *supra*)) were in any way relevant to its decision. As rationales not expressed by the Board in its decision, the Board's post hoc explanations cannot cure inadequacies in its initial decisionmaking. *See SEC v. Chenery Corp.*, 333 U.S. 194 (1948).

II. AN EMPLOYER'S OBLIGATION TO ABIDE BY EXISTING TERMS AND CONDITIONS OF EMPLOYMENT UPON THE EXPIRATION OF A COLLECTIVE BARGAINING AGREEMENT APPLIES TO THE OBLIGATION TO ARBITRATE.

A. *The Unilateral Change Doctrine:* In general, a "refusal to negotiate *in fact* as to any subject which is [a mandatory subject of bargaining], and about which the union seeks to negotiate, violates § 8(a)(5), though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." *NLRB v. Katz*, 369 U.S. 736, 748 (1962) (emphasis in original). Given this broad principle, *Katz* goes on to hold "that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a *circumvention of the duty to negotiate* which frustrates the objectives of § 8(a)(5) as much as does a flat refusal." *Id.* (emphasis supplied, footnote omitted).

Five years after *Katz*, this Court confronted a factual variation on the same theme, and confirmed that the unilateral change doctrine also applies where the change occurs *during* the life of a collective bargaining agreement, except to the extent that the contract can be read as a waiver of the employees' § 7 right to bargain collectively as to the particular question. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). And, most recently, *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988), reaffirmed the unilateral change doctrine, as applied to a situation, like this one, in which there is an expired collective bargaining agreement:

> Freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus an employer's failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of Sections 8(a)(1), 8(a)(5), and 8(d) . . . [Citation omitted] . . . Consequently, any unilateral change by an employer . . . in the expired agreement is an unfair labor practice. [Citations omitted]. [484 U.S. at 544, n.6.]

The statutory obligation to maintain the status quo during negotiations, then, obtains throughout the collective bargaining relationship, because "an employer's unilateral [changes] during the bargaining process tends to subvert the union's position as the representative of the employees in matters of this nature" (*NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960)), by "showing the employees that it is useless to try to negotiate," (Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1428 (1958)).[20]

Because the purpose of the unilateral change doctrine is to protect the bargaining process, the Labor Board, with the approval of the courts of appeals, has applied the doctrine on the understanding that "generally, provisions of the expired collective-bargaining agreement that relate to mandatory subjects are said to survive the agreement's expiration," save for a "narrow class of exceptional mandatory subjects" excluded because the subject involves "a statutorily guaranteed right [or is] statutorily dependent upon an existing collective-bargaining agreement."

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[20] Because the unilateral change doctrine is grounded in the duty to bargain, the Board recognizes that at some point in negotiations —the point at which impasse is reached—the employer has sufficiently discharged his bargaining duty that the obligation to maintain the status quo no longer obtains. *See Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enf'd sub nom Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The impasse limitation has no possible application here, since the employer did not negotiate at all about altering the arbitration procedure.

Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1113, 1114 (D.C. Cir. 1986).[21]

For example, the Board and the lower courts have excluded from the unilateral change doctrine union-shop and dues-checkoff arrangements, because, in the Board's view, those employment conditions are permitted by the federal labor statutes only where the condition is expressly codified in a collective bargaining agreement. *See* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (*four times* conditioning the maintenance of a union security agreement upon an agreement to do so); LMRA § 302(c)(4), 29 U.S.C. § 186(c)(4) (stating that dues checkoff systems are valid only until the "termination date of the applicative collective bargaining agreement"); *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *aff'd in pertinent part sub nom Shipbuilders v. NLRB*, 320 F.2d 615 (3rd Cir. 1963), *cert. denied* 375 U.S. 984 (1964); *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981). Thus, "an employer's refusal to enforce a union-security [or dues check-off] provision without a contractual basis is 'in accordance with the mandate of the Act.'" *Indiana & Michigan*, 284 NLRB at 55, *quoting Bethlehem Steel.* Similarly,

> a no strike provision does not survive except (in keeping with the strong national policy favoring arbitration, *see* [*Nolde*]), if and to the extent that its correlative arbitration clause survives, *see Goya Foods, Inc.*, 238 NLRB 1465, 1467 (1978). That rule is attributable to the union's statutory right to strike, *see* 29 U.S.C. §§ 158(d)(4), 163; *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293 (1957). A waiver of that right during the life of the collective-bargaining

[21] Because it is rooted not in the contract but in preservation of existing terms and conditions of employment and applies before any contract has been negotiated as well as between agreements, the obligation to maintain the status quo extends beyond the language of the contract to past practices not incorporated in terms in the contract. *The Sacramento Union*, 258 NLRB 1074, 1074-76 (1981).

> agreement is not a "clear and unmistakable" waiver, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-10 (1983), of the right to strike beyond the contract term. . . . *cf. NLRB v. Lion Oil Co.*, 352 U.S. at 293. . . . [*Southwestern Steel & Supply*, 806 F.2d at 1114.]

On the other hand, the Board has carved out exceptions to the unilateral change doctrine only upon clear and compelling statutory grounds in recognition of the importance of the doctrine in the success of the bargaining process.

For example, the Board has repeatedly held that the obligation to contribute to pension and health and welfare funds continues after contract termination, notwithstanding the contention that 29 U.S.C. § 186(c)(5)(B) mandates a written agreement in order to support such pension or health and welfare contributions. In so doing, the Board views "an expired contract, under which the obligation to make payments to the fringe benefit funds arose, [as] sufficient to meet the 'written agreement' requirement of Section 302(c)(5)(B)." *Concord Metal, Inc.*, 298 NLRB No. 167, slip op. at 3 (1990) (citations omitted). And the Board has maintained that hiring halls established by labor contracts remain effective between contracts, absent impasse on the issue during negotiations. In so doing the Board has rejected the contention that hiring hall clauses should be excluded from the unilateral change doctrine because, although mandatory subjects of bargaining, hiring halls do not directly implicate the employment relationship. *Southwest Security Equipment Corporation*, 262 NLRB 665 (1982), *enf'd*, 736 F.2d 1332, 1337-38 (9th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); *Southwestern Steel & Supply, Inc.*, 276 NLRB 1569 (1985), *enf'd*, 806 F.2d 1111, 1113-1114 (D.C. Cir. 1986).

B. *Application of Unilateral Change Doctrine to Arbitration*: Arbitration clauses are mandatory subjects of bargaining (*U.S. Gypsum Co.*, 94 NLRB 112 (1951)),

a proposition not questioned in this case. Indeed, it has been convincingly argued that arbitration systems are the single *most* important term of employment, since without a relatively disinterested adjudicatory system, the underlying substantive terms and conditions of employment may as a practical matter prove unenforceable. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 668, 792-99 (1978).[22]

The Board in *Indiana & Michigan Electric*, after following a shifting course on the question for many years, has nonetheless held that arbitration clauses are one of the exceptional provisions excluded from the unilateral change doctrine.[23] The principal reason the Board offered

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[22] Judicial enforcement of the status quo obligation as such would not be available. That obligation is derived not from the contract itself but from the NLRA and is therefore enforceable only through the processes of the NLRB in the first instance. *Advanced Lightweight, supra*, 484 U.S. at 549.

[23] The Board first held that an employer could not repudiate a grievance procedure, including arbitrators, in *Bethlehem Steel, supra*. See also *Kingsport Press*, 165 NLRB 694 (1967), *enforcement denied*, 399 F.2d 660 (6th Cir. 1968).

In *Hilton-Davis Chemical Company*, 185 NLRB 241 (1970), the Board, changing course, held over a dissent that the employer was *not* obligated to respect the arbitration procedure after the contract had expired under any circumstances.

Shortly after this Court decided *Nolde*, the Board reconsidered the question of whether and to what degree arbitration clauses survive contract termination. A unanimous Board in *American Sink Top Co.*, 242 NLRB 1175 (1979) applied *Nolde* broadly to require contract-based arbitration to any grievance whose basis was "arguably" the contract. And, in *Southwest Security Equipment, supra*, 262 NLRB at 665 n.1 and 669-70, the Board concluded that an arbitration clause does survive contract termination under the unilateral change doctrine.

Finally, five years later, in *Indiana & Michigan*, the Board eschewed both *American Sink Top Co.* and *Southwest Security Equipment*, and held (again over dissent) both that *Nolde* is to be applied narrowly and that the *Katz* doctrine does not apply to arbitration clauses (although, said the Board, *Katz* does apply to grievance procedures short of binding arbitration).

for this conclusion is that arbitration clauses, like union security and dues checkoff provisions, "are purely creatures of contract." *Id.*, 284 NLRB at 55, 57-59. As subsidiary reasons, the Board maintained first, that arbitration involves a waiver of a statutory *employer* right to bargain, and therefore cannot be imposed absent such a waiver (*id.*, at 55, relying on *Hilton-Davis Chemical Co., supra*); and second, that there must be symmetry between the treatment of arbitration clauses and of no-strike clauses in the post-contract period, because one is the *quid pro quo* for the other (284 NLRB at 58).

None of these reasons withstands a moment's consideration. At least equally to the point, the Board's reasoning does not take into account the critical consideration that permitting employers to abandon arbitration systems during negotiations will undermine the collective bargaining system in exactly the ways that the unilateral change doctrine is structured to prevent.

a. The Board's primary ground for excluding arbitration arrangements from the unilateral change doctrine—that such clauses are contract-dependent as a matter of federal labor policy—fails because arbitration is no *more* a matter of contract than any other term or condition of employment typically embodied in collective agreements.

(i) As this Court stated emphatically in *H.K. Porter v. NLRB*, 397 U.S. 99, 109 (1970), the premise of the entire statute is to promote "private bargaining under governmental supervision of the procedure alone, *without* any official compulsion over the actual terms of the contract." (Emphasis supplied).

This policy was enunciated by the framers of the original Act in 1935, who stressed that they "wished to dispel any false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms," (S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935)), and was directly embodied in the statute by Congress in 1947, when § 8(d) was added.

That section provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." *See also, e.g., NLRB v. Insurance Agents*, 361 U.S. at 497 ("§ 8 (d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements.")

In short, aside from obligations such as those embodied in the minimum wage laws, under our system of collective bargaining *all* terms and conditions of employment are intended ultimately to be the result of agreement between the parties. *No* employer is obligated to pay any particular wages, provide overtime bonuses, permit vacations, abide by any pension or health and welfare plan, or observe limitations on the hours employees work, *unless* the employer has reached agreement with the union to do so.

(ii) Against this background, the *Indiana & Michigan* Board's central basis for treating arbitration clauses specially under the *Katz* analysis must fail unless such clauses are "purely creatures of contract" in some sense *different* from other terms and conditions of employment. But the Board's opinion in *Indiana & Michigan* provides no basis for perceiving such special "ultracontractual" status for arbitration clauses.

First, the Board is unable to point to any language in the statute which remotely suggests that arbitration is dependent upon the existence of an agreement in the same sense as are union security and dues checkoff clauses under the Board's construction of § 8(a)(3) and § 302 (c)(4). Nothing in the NLRA precludes employers generally from instituting arbitration procedures without a collective bargaining agreement, and indeed in recent years many nonunion employers have begun unilaterally to institute grievance procedures culminating in neutral

arbitration.[24] In contrast, a nonunion employer who required an employee to contribute toward, or provided automatic payroll deductions for dues to, a labor organization would violate §§ 8(a)(2) and 8(a)(3) of the Act, or 29 U.S.C. § 186(c)(4).

Nor is the legislative history of the NLRA discussed in *Indiana & Michigan*, 284 NLRB at 57, relevant in this regard. That history shows that in describing the obligation to bargain collectively in good faith, in § 8(d) of the Act, 29 U.S.C. § 158(d), Congress specifically declined to include an obligation to confer in good faith with regard to "*the settlement* of any question arising []under" a collective bargaining agreement, because Congress did not wish to " 'require compulsory arbitration of grievance disputes and other disputes over the interpretation or application of the contract.' " *Id.* 284 NLRB at 57, *quoting* H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947).

This sequence demonstrates only that Congress did not intend to embody in the NLRA, as it had in the Railway Labor Act, 45 U.S.C. § 2, Sixth, a *requirement* that all unions and employers negotiate about and subscribe to binding arbitration. The legislative sequence does *not* address the separate question whether an employer, *having once voluntarily instituted arbitration* as a term or condition of employment in its workplace (either on its own or as a result of negotiations with a union), can then simply declare unilaterally that employees may no longer have the assurance that their substantive terms of employment will be enforceable by a disinterested party. Thus, the Board lacks any legislative materials which supports its position that once arbitration *is* agreed to, the obligation ends with the termination of the agreement.

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[24] *See, e.g.*, Guidry and Huffman, *"Legal and Practical Aspects of Alternative Dispute Resolutions in Non-Union Companies"* 6 The Labor Lawyer 1 (1990).

Similarly, the Board's heavy reliance on the statements in this Court's opinions that "arbitration is a matter of contract" (*Warrior & Gulf, supra*, 363 U.S. at 582; *see also Gateway Coal Co., supra*, 414 U.S. at 374) disregards their context. *Warrior & Gulf*, for example, notes that "a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit" (363 U.S. at 582), in the course of resolving a question concerning the scope of the arbitration clause. But nothing in that opinion, or in any other opinion of this Court, indicates that arbitration clauses are a "matter of contract" in any sense *different* from any other term or condition of employment.

(iii) Thus, arbitration clauses are "matters of contract" under the NLRA only in the *same* sense as are other terms and conditions of employment: Whether or not to provide for arbitration is left to the parties in the first instance, because the statute generally regulates only the bargaining process, and does *not* mandate any of the substantive terms and conditions of employment. And, as this Court has repeatedly recognized, the basic rule that once the parties have agreed on a contract term the employer can not unilaterally change that term during negotiations is supportive of, rather than in tension with, this overall statutory scheme.

The *Katz* doctrine does *not* choose for the parties which terms to institute in the first place. Rather, *Katz* and its progeny concern only *changes* in those terms the employer has already once agreed to as appropriate, whether unilaterally or through bargaining, and seeks to assure, by protecting the integrity of the bargaining process, that those changes will in fact be the result of consensual, bilateral decisionmaking. As to this purpose, arbitration is indistinguishable from any other term and condition of employment to which the parties have agreed, since, *for the future*, the shape of the grievance and arbitration process, if any, is for the parties to determine.

Indeed, it could be argued that, if anything, the unilateral change doctrine should have *greater* force with respect to arbitration provisions, since the inclusion of such clauses in the agreements ultimately negotiated is the *only* kind of term or condition of employment which the statute affirmatively encourages. *See* NLRA § 13(d), 29 U.S.C. § 173(d). Consequently, there is a particular reason under the NLRA to "foster[] a non-coercive atmosphere that is conducive to serious negotiations on a new contract" (*Advanced Lightweight, supra*, 484 U.S. at 544, n.6) with regard to arbitration.[25]

b. As a corollary to its reliance on the contractual nature of an arbitration provision, the *Indiana & Michi-*

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[25] An example might clarify this point: *Katz* would, absent the Board's exception for arbitration clauses, require that if a non-union company had instituted a neutral arbitration system as a term or condition of employment (as employers are increasingly doing precisely as a means of avoiding union organization, *see* n.24, *supra*), that system remain in effect once a union is certified, unless and until the parties either agree otherwise or bargain to impasse on the question. *Cf. Donn Products, Inc.*, 229 NLRB 116, 117 (1977) (unilateral implementation of arbitration for employee grievances violative under *Katz*). Presumably, under *Indiana & Michigan*, however, an employer could abandon the arbitration process upon union certification (unless it could be proven that the employer's purpose in doing so was to frustrate the bargaining process). Although the Board has not expressly so ruled, this result ineluctably follows from established unilateral change principles, which, as we have seen, do not differ in their operation during initial bargaining and during contract hiatus periods.

This result, however, would have precisely the effects that the unilateral change doctrine is designed to avoid: The employer would have refused to negotiate, in fact, about a matter likely to be of major concern to the employees during the period negotiations are ongoing, and could create the coercive impression that choosing union representation decreases rather than improves employment security, thereby undermining the union's strength and cohesiveness at the bargaining table. At the same time, there would be no sense in regarding the arbitration system as purely contractual under those circumstances, since the system was unilaterally instituted by the employer in the first place before the union was certified—just as were the wage rates, hours, and so on.

gan Board also suggested—drawing upon a more complete discussion of this point in *Hilton-Davis Chemical Co.*, *supra*—that the Act confers on employers a *right* to engage in free collective bargaining with regard to the implementation of established terms and conditions of employment, and to use economic power in support of their bargaining position, rather than to entrust binding decisionmaking on such implementation questions to a neutral third party. This "right," the Board indicated, can be surrendered only by voluntary contract, and not otherwise. 284 NLRB at 55-56; *see also Hilton-Davis*, *supra*, 185 NLRB at 242.

The difficulties with this analysis are numerous. For one thing, while the statute does in terms protect the right of *employees* to bargain collectively, NLRA § 7, 29 U.S.C. § 157, there is no parallel provision with respect to employers. And, in fact, the overall structure of the statute does *not* provide the employer with any *right* to bargain collectively with a union; to the contrary, the employer may not impose a union on its employees or require a union that does not wish to do so to represent its employees. *See, e.g., American Sunroof Co.*, 243 NLRB 1128, 1129 (1979).[26] And while there is *explicit* statutory protection for the right to strike (§ 13, 29 U.S.C. § 163), there is none for the employer's right to engage in economic warfare. In short, although the statute does require that *if* a union agrees to represent employees in bargaining, the union must bargain in good faith (NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3)), nothing in that provision confers on the employer an enforceable *statutory* right to negotiate about implementation issues, rather than to abide by the decision of a third party selected mutually by the union and the employer.

[26] In contrast, a union *can* compel an employer to engage in collective bargaining against the employer's will, by invoking the union certification procedures of § 9(a) of the Act, 29 U.S.C. § 159(a). *See Linden Lumber Division v. NLRB*, 419 U.S. 301 (1978).

Moreover, whatever the scope of the protection accorded by the statute to employer bargaining and economic weapons, there is *no* basis for drawing a *different* line in this regard with regard to arbitration and other terms and conditions of employment. The net result of eliminating arbitration as a mechanism for determining disputes regarding deviations from the terms and conditions of employment established by the expired contract during the contract hiatus period is *not*, under the Board's doctrine, to allow such deviations wholesale; the result is to substitute the Board for the arbitrator. *See* n.22, *supra*.

Thus, an employer does *not*, under Board doctrine, have the freedom to interpret and apply the previous agreement according to its own views, or to engage in economic warfare in support of its interpretation, during initial bargaining or contract negotiation periods. Rather, the very doctrine the Board refuses to apply to arbitration provisions—the unilateral change doctrine—constrains the free play of economic forces as to the continuity of established terms of employment.[27]

The Board's approach in this regard, moreover, fails to factor in the statutory *preference* that the parties to a collective bargaining relationship establish and maintain an independent decisionmaking process. *See* pp. 40-41, *supra*. In this instance, for example, the union could have sought to have the Board adjudicate as an unfair labor practice its contention that the layoffs were in contravention of the standards established by the lapsed agreement for making layoff decisions, and thus constituted a unilateral change in these standards. Pet. App. B16, n.9. Instead, the union attempted to have that issue decided by the neutral mechanism the parties themselves had established. To hold the former option is available but not

[27] This is not to say that *any* dispute over the application of standards contained in the expired agreement constitutes a sufficient unilateral change to amount to an unfair labor practice.

the latter creates discontinuities in developing the "common law of the shop" through the system best equipped to do so, and could thereby impair the efficacy of arbitration *after* a new agreement is reached.

c. Finally, *Indiana & Michigan* suggests that carrying an employer's obligation to arbitrate forward into the contract hiatus period would be inherently unfair, because the arbitration agreement is the *quid pro quo* for the union's no-strike pledge, yet the no-strike clause, as the waiver of an explicit statutory right, would not be enforceable during that period. 284 NLRB at 58.

This contention obscures the distinction between two aspects of contractual no-strike commitments: The first, which is inherent in the union's agreement to arbitrate and therefore need not be explicit, is the commitment to submit disputes over the employer's implementation of the contract's terms to final and binding arbitration, rather than to settle such disputes through economic warfare. *Local 174, Teamsters v. Lucas Flour Co., supra.* In addition, however, a no-strike clause, depending upon its precise breadth and specificity, can encompass a commitment not to strike to *change* the basic contract during its term. *See generally* Feller, *A General Theory of the Collective Bargaining Agreement, supra,* 61 Cal. L. Rev. at 753-755 & 792-805.[28] That broad commitment is entirely separate from any agreement to arbitrate. And, this Court's cases indicating that an arbitration clause is usually the *quid pro quo* for a no-strike pledge refer to the obligation not to strike over arbitrable grievances, *not* to any broader no-strike obligation. *E.g., Boys Markets, Inc. v. Retail Clerk's Union,* 398 U.S. 235, 248 (1970); *Gateway Coal,* 414 U.S. at 882.[29]

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[28] In fact, the agreement in this case had two distinct no-strike clauses for each of these separate purposes. *See* n.11, *supra.*

[29] As we understand this Court's opinions, the references to arbitration clauses and no-strike clauses covering arbitrable grievances as the "quid pro quo" for each other were intended in the metaphorical sense: Negotiating parties would ordinarily perceive the two as interdependent, and not agree to one without the other. As a matter of actual give and take at the bargaining table, however, the union may, depending on the circumstances, have not only to forego the right to strike over issues concerning contract application but, as well, lower its wage, hour, benefit, or other demands in order to convince the employer to agree to an arbitration system. In other words, abandoning the arbitration system can fundamentally distort the *total* package of terms and conditions of employment contained in the agreement and carried forward into the contract hiatus period, since the other terms may have been acceptable only in light of the arbitration commitment.

Once this distinction is understood, it becomes clear that the issue regarding the relative rights of the parties to engage in economic warfare raised by application of *Katz* to arbitration clauses is a very narrow one.

Plainly, nothing in the *Katz* doctrine, including continuity of the arbitration commitment, would affect the union's right to strike in support of its bargaining demands for a new contract immediately upon the expiration of the collective bargaining agreement.

There is also no reason, however, why carrying forward the arbitration system for the purposes of determining disputes regarding the *established* terms and conditions of employment would in any way prevent the *employer* from engaging in economic warfare, including, for example, a lockout, in order to enhance its position at the bargaining table. On the other hand, an employer has *no* statutory right to lock out, or engage in other unilateral action, *in support of any unilateral change,* because the substantive unilateral change itself would be an unfair labor practice.

Thus, the symmetry notion comes down to the assertion that if *Katz* applied to arbitration clauses, the employer could not lock out in support of its position in a dispute about whether or not a certain action in fact is inconsistent with the prior contract's norms, but the un-

ion could strike. While, if the Board's position in *Indiana & Michigan* were reversed, it would be for the Agency to determine the consequences of that reversal for the union's right to strike in that circumstance, there is no reason to believe that a solution consistent with the statute, both in preserving the union's statutory right to strike and the overall balance of power between the parties, would not be forthcoming.[30]

For example, where the union actually invokes the arbitration procedure with respect to a particular grievance, the union has, at the least, necessarily agreed to arbitrate that dispute, and "the unique conjunction between arbitration and no-strike" commitments (*Metropolitan Edison Co. v. NLRB*, 460 U.S. at 708, n.12) could then support the conclusion that there is a concommitant commitment not to strike concerning that grievance as well.[31] Moreover, it is possible that the union could be required to express a willingness, for some period of time or for the entire length of the contractual hiatus period, not to strike over arbitrable grievances, before it could success-

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[30] Analoyogus problems remain with respect to the *Indiana & Michigan* Board's conclusion that the grievance procedure short of submission to a neutral decisionmaker *does* survive contract expiration. For example, the Board has not yet, to our knowledge, explained whether a union can strike during the pendency of a grievance procedure invoked under *Indiana & Michigan*. Nor do we know whether it is the "grievance" or the "arbitration" rule of that case that applies to final dispute resolution systems, very common in collective bargaining agreements, that consist not of neutral decisionmakers but of representatives from union and management. *See Teamsters v. Riss and Co.*, 372 U.S. 517 (1963).

[31] This result is particularly likely in this instance, because the parties expressly provided in their contract that the union cannot take economic action over any grievance. *See* n.11, *supra*.

Further, as to many grievances at least, the no-strike commitment of the prior contract would carry forward, because the arbitration agreement would be contractually as well as statutorily based. *See Goya Foods, Inc., supra*.

fully invoke the arbitration clause in the first instance after contract expiration.

d. The upshot of the foregoing analysis is that the Board has given no reasoned explanation for creating an exception to the unilateral change doctrine for arbitration. Moreover, that exception is based upon a misunderstanding of this Court's cases on the nature of the arbitration commitment, and fails to give any weight to the affirmative statutory policy in favor of the inclusion of arbitration provisions in collective bargaining agreements. As such, the *Indiana & Michigan* application of the *Katz* rule to arbitration clauses fails even the deferential standard of review this Court applies to Board statutory decisions.

Board decisions are "judicially reviewable for consistency with the [governing] Act, and for rationality." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). Moreover, "[d]eference to the Board, 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" *NLRB v. Financial Institution Employees*, 475 U.S. 192 at 202 (1986) (citation omitted). Applying these standards, this Court has refused on a number of recent occasions to defer to the Board's construction of the Act.[32]

In this instance, moreover, theer are two weighty considerations in addition to the Board's failure to satisfy

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[32] *See, e.g.*, in addition to *NLRB v. Financial Institution Employees Association*; *NLRB v. International Longshoremen's Association*, 473 U.S. 61 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); *DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983); *Florida Gulf Coast Building Trades Council v. NLRB*, 485 U.S. 568 (1988); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and *Detroit Edison Co. v. NLRB*, 440 U.S. 201 (1979).

minimal standards of rationality, that caution against according the usual respect to the Board's views on the unilateral change issue. First, those views were premised upon the Board's erroneous understanding of this Court's cases interpreting collective bargaining agreements. The Board has no particular expertise on contract interpretation questions (*see* pp. 28-29, *supra*), nor any special role in applying this Court's precedents. *See NLRB v. International Longshoremen's Association*, 473 U.S. at 80. Second, in this instance the Board has radically altered its course several times. *See* n.23, *supra*. "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis beyond that which may be required when an agency does not act in the first instance." *Motor Vehicles Manufacturers Association v. State Farm Mutual*, 463 U.S. 29, 42 (1983).[33] In light of the legal, logical and practical deficiencies of the Board's opinion in *Indiana & Michigan* surveyed above, the Board has not met that heightened standard.

Consequently, should the Court find it necessary to address the question in order to decide this case, the Board's holding that the employer did not violate its obligation to maintain the status quo during negotiations by abandoning the arbitration clause should be disapproved.

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[33] While the Court has approved the use of an "evolutionary" Board approach toward difficult problems of statutory interpretation as a response to "significant developments in industrial life [which were] believed by the Board to have warranted a reappraisal of the question . . ." (*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975)), what has changed here is not "industrial life" but the Board's views on strictly legal issues.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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